THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on :06.03.2007

+ **WP(C) No.5686-87/2006**

COL. T. PRASAD & ANOTHER ...Petitioners

- versus -

UNION OF INDIA & OTHERS ...Respondents

Advocates who appeared in this case:

For the Petitioners : Ms Rekha Palli with Ms Punam Singh
For the Respondent No.1 : Mr Rajeev Mehra with Mr Arjun Hrakauli
For the Respondent No.3 : Mr Ravindra Singh
For the Respondent No.4 : Mr Neeraj Kishan Kaul, Sr Advocate with Mr Ajit Warrior

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

1. Whether Reporters of local papers may be allowed to see the judgment ? Yes

2. To be referred to the Reporter or not ? Yes

3. Whether the judgment should be reported in Digest ? Yes

BADAR DURREZ AHMED, J (ORAL)

1. This petition has been filed by two officers of the Indian Army. The grievance of the petitioners is that when persons belonging to the Armed Forces, such as the petitioners, cross over from Delhi to Uttar Pradesh or vice-versa through Delhi Noida Direct Flyway (hereinafter referred to as the 'DND Flyway') they have to pay a fee for each such crossing. According to the petitioners, such personnel were exempted from paying any toll or fee in view of Section 3 of the Indian Tolls (Army & Air Force) Act, 1901 (hereinafter referred to as the '1901 Act').

2. In response, the respondent No.4, namely, the Noida Toll Bridge Company Ltd (hereinafter referred to as 'the company') has taken the preliminary objection that this petition is not maintainable before this court on account of lack of territorial jurisdiction. Another plea that has been taken by the respondent No.4 is that the interpretation of the 1901 Act cannot be stretched to such an extent as to include the fee charged by the company which is not a public authority. It is further contended that the fee that is being charged by the company is for the use of the DND Flyway and it is being charged on the basis of a Concessionaire Agreement entered into between the company and the New Okhla Industrial Development Authority (NOIDA) [Rrespondent No.3] on 12.11.1997. It is further contended that this Concessionaire Agreement was entered into in terms of the New Okhla Industrial Development Area (Levy of Infrastructure Fee) Regulations, 1998 which, in turn, were formulated in exercise of powers under Section 19 of the Uttar Pradesh Industrial Area Development Act, 1976. It was contended that the Act as well as the regulations permitted NOIDA, either by itself or through a developer on the basis of the agreement, to develop, construct, provide or maintain or continue to provide or maintain the infrastructure in the area covered under the New Okhla Industrial Development Area. Regulation 3 of the 1998 regulations also specifically provides for this. Regulation 2 (e) defined the term “developer” as a person who constructs, develops, maintains or provides an infrastructure or collects fee therefor in the New Okhla Industrial Development Area on the basis of an agreement. Regulation 2 (f) defines fee to mean, in relation to an

infrastructure, an amount levied upon or payable by a person under the said regulations for the use of an infrastructure in the New Okhla Industrial Development Area. Regulation 3 (b) specifically provides that the agreement that may be entered into with a developer, as indicated above, may provide for, *inter alia*, the fee to be levied and collected for the said infrastructure and Regulation 5 of the 1998 regulations further provide that the respondent No.3 would have the powers to authorise the developer to collect and appropriate the fee levied under the regulations in accordance with the agreement and that the developer's right to collect or appropriate the fee assignable to the lenders or the developer. It was also provided that where the respondent No.3 authorises the developer to collect and appropriate the fee, the agreement should also provide for a mechanism for determination of levies and publication of the rate of fee.

3. The learned counsel appearing on behalf of the respondent No.4 as well as on behalf of the respondent No.3 have stated that the collection of fee by the company is pursuant to an agreement entered into between them and in terms of the 1998 Regulations and the Uttar Pradesh Industrial Area Development Act, 1976. It is contended that the company by virtue of the aforesaid agreement, regulations and the Act, have been granted exclusive rights to build, operate and transfer the DND Flyway connecting Delhi and Noida and charge the users of such facility a fee as defined in the Concessionaire Agreement. The relevant portions of the Concessionaire Agreement are indicated hereinbelow:-

"**Fee**—means the amount of money demanded, charged, collected, retained and appropriated by the Concessionaire for and on behalf of NOIDA from the users of the Noida Bridge as fee for the provision of the Noida Bridge, in accordance with the rules prepared by NOIDA under Section 19 of the Act and the provisions of Article 13 herein."

"Noida Bridge—means the bridge which will connect Maharani Bagh at the Delhi end with Okhla Barrage at the Noida end and shall include (a) an eight lane, 552.5 meter bridge which will expand over the Yamuna River, (b) three interchange bridges, (c) cloverleaf flyovers, (d) a toll plaza, located at the Noida end, (e) river protection works and (f) inter-change roads to inter-face with the existing road network, all as more fully described in Appendix A to D hereto."

"User—means the persons who travel over or utilise the Noida Bridge for the purpose of commuting across the River Yamuna in any motor vehicle."

"Grant of Concession

(a) NOIDA hereby irrevocably grants to the Concessionaire the exclusive right and authority during the Concession Period to develop, establish, finance, design, construct, operate and maintain the Noida Bridge as an Infrastructure Facility for the benefit of the residents, and industries, and for the development of commerce in Noida and permits it to enter into the Ashram Flyover Construction Agreement and the Concessionaire hereby accepts the Concession granted to it by NOIDA and further agrees to implement the Project, in accordance with the terms and conditions of this Agreement.

(b) NOIDA further grants to the Concessionaire the exclusive right and authority during the Concession Period to in accordance with the terms and conditions of this Agreement:

    (i) develop, establish, finance, design, construct, own, operate, maintain use and regulate the use by third parties of the Noida Bridge;

(ii) enjoy complete and uninterepted possession and control of the lands identified as consisting the Bridge Site;

(iii) own all or any part of the Project Assets;

(iv) determine, demand, collect, retain and appropriate a Fee from the users of the Noida Bridge and apply the same in order to recover the Total Cost of Project and the Returns thereon;

(v) restrict the use of the Noida Bridge to motorized vehicles, bicycles and pedestrians and to debar animal drawn vehicles, cycle-rickshaws and cattle from the Noida Bridge.

(vi) enforce the collection of Fee from delinquent Users of the Noida Bridge and impound the vehicles and goods of any such delinquent User for the purpose of enforcing collection;

(vii) develop, establish, finance, design, construct, operate, maintain and use any facilities to generate Development Income arising out of the Development Rights that may be granted in accordance with the provisions of Article 4 herein;

(viii) enter into private contracts with the Users for any use or any special use of Noida Bridge and to sell, distribute or issue, at various outlets as may be determined by the Concessionaire, coupons or tokens against payment of Fee in advance, thus providing the Users with ready access to Noida Bridge without the necessity of paying Fee on each incidental use of the Noida Bridge; and

(ix) appoint subcontractors or agents on its behalf to assist it in fulfilling its obligations under this Agreement."

"13.1 Collection of Fee

(a) The Fee shall be determined by the Fee Review Committee in accordance with the provision of this

Article 13 except for the Base Fee Rates which have already been determined and approved by the Steering Committee and has been specified in Section 13.2 hereinbelow.

(b) The Fee shall be, collected, retained and appropriated from the users of the Noida Bridge by the Concessionaire, commencing on the Project Commission Date.

(c) The Concessionaire may delegate its function to collect Fee to the O&M Contractor under the O&M Contract, in accordance with the Rules framed by NOIDA under the Act. In such event, the O&M Contractor shall collect the Fee for and on behalf of the Concessionaire.

(d) NOIDA and the Concessionaire expressly recognizes (i) the right of the Fee Review Committee to determine Fee in accordance with the provisions of this Agreement, and the rules framed by NOIDA in relation to levy of Fee under the Act (ii) the right of the Concessionaire to, demand, collect, retain, and to appropriate Fee in accordance with the terms of this Agreement and the rules framed by NOIDA in relation to levy of Fee under the Act, (iii) to exercise all rights and remedies available under law for the recovery of the Fee and (iv) the right of the O&M Contractor to demand and collect Fee on behalf of the Concessionaire.

(e) In the event that the Fee is not recoverable for any reason related to a Change in Law or as a result of any restriction or injuction based on any process of law, the Concessionaire shall be entitled to receive compensation from NOIDA in accordance with Section 18."

"13.4 Fee Review Committee

(a) Within 60 days prior to the scheduled Project Commissioning Date, the NOIDA and the Concessionaire shall establish a Fee Review Committee for the purpose of determining any

revision to the rate of Fee levied or revision of the formula for calculation of the Fee Rate submitted by the Concessionaire under the provisions of Section 13.5 The Fee Review Committee shall comprise of three Persons; NOIDA and the Concessionaire shall each appoint one representative who shall be duly qualified Persons having adequate experience in the field of management, operation and maintenance of bridges and roads. The third member shall be a duly qualified Person appointed by the representatives appointed by NOIDA and the Concessionaire, respectively. In the event the representative appointed by NOIDA and the Concessionaire are unable to agree on the third member, within a period of 7 days from their appointment, the Person recommended by the Lenders shall be appointed as the third member, provided such Person is an Indian Citizen.

(b) The third member shall be the Chairman of the Fee Reviewing Committee. The Fee Reviewing Committee shall meet upon 7 days notice by the Chairman, at the request of the Concessionaire, or at such time intervals as required by the Parties. In the event that any Party is absent from any meeting of the Fee Reviewing Committee or determines not to cast a vote or in the event of a parity of votes in a meeting, the Chairman shall have the casting vote."

4. Mr Kaul, the learned senior counsel, who appears on behalf of the company [Respondent No.4] made a two-fold submission, as indicated above, that first of all, this writ petition ought not to be entertained by this court inasmuch as the entire cause of action has arisen in Uttar Pradesh. He submitted that the cause of action for filing this petition is the charge of the fee and the fee is collected at the Toll Plaza which is situated in Uttar Pradesh. As a corollary to this submission, he submits that

even if it is construed that some part of the cause of action has arisen in Delhi, inasmuch as part of the DND Flyway falls within the territorial jurisdiction of NCT of Delhi, it is only a small and a minuscule part. To support this contention, he relied upon the decision of a learned single judge of this court in the case of ***Jitendra Nath Banerjee & Ors v. Union of India & Ors*****: 2006 V AD (Delhi) 26.** And, for the purpose of contending that the courts, while exercising writ jurisdiction under Article 226, should also take into account the forum of convenience, he also relied upon the decision of the Supreme Court in the case of ***Kusum Ingots & Alloys Ltd v. Union of India and Another*****: (2004) 6 SCC 254** (para 30).

5. The second line of argument advanced by Mr Kaul is that even if this court has territorial jurisdiction, on merits, the petition ought to be dismissed on the ground that the fee that is being charged by the company, as indicated above, would not fall within the expression "tolls" appearing in the 1901 Act. The submission made by him in this regard is that the 1901 Act had in contemplation only tolls levied and collected by the Government and other public authorties. It did not contemplate a situation such as the one arising in the present case where the entire project was, by an agreement, given over to a private developer to build, operate and own and ultimately transfer it back to the Government authorities. He submitted that in this light, the decision of the Supreme Court in the case of ***B.N. Sinha v. Union of India and Others*****: 1998 (3) SCC 157** ought to be kept in mind. He referred, in particular, to paragraph 10 of the said decision which reads as under:-

> "10. The Tribunal, by the impugned judgment, by stretching the Recruitment Rules, 1975 to a post, namely, the post of Chief Engineer (Civil) Level II, has only attempted to legislate on a subject which was not its business. The Rules of Statutory Interpretation or the Rules relating to the interpretation of a subordinate legislation, including Rules made under Article 309 of the Constitution, do not empower any judicial or quasi-judicial body to apply the law to a situation or object which was not contemplated by the legislature while making a law, or by the Government while making the rule. The Tribunal, thus, committed a manifest error of law in holding that in the absence of any rule regulating the appointment on the post of Chief Engineer (Civil) Level II, the Recruitment Rules of 1975 would apply to that post."
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> (Underlining added)

6. The main thrust of his argument was that while interpreting any Act, the object of the Act must not be lost sight of. The provisions of an Act must not be interpreted in a manner which would have been completely beyond the contemplation of the Legislature while enacting that piece of legislation. He submitted that it could safely be said that in 1901 the situation such as the present one was completely beyond the contemplation of the Legislature.

7. The learned counsel appearing on behalf of the respondent No.3 also supported these contentions.

8. Insofar as the Union of India is concerned, their stand has been made clear in their affidavit. According to the Union of India, the DND Flyway does not form part of any National Highway. And, insofar as National Highways are concerned, they

have already issued a circular exempting, amongst others, Army personnel from paying tolls. To particularise the stand taken by the Union of India, a reference to paragraphs 2, 3 & 7 of their affidavit would be necessary. The same read as under:-

> "2. It is further submitted that DND Flyway from DELHI-NOIDA-DELHI or any part thereof, does not fall under the category of National Highway under the National Highways Act, 1956, and therefore no toll tax has been imposed on the DND Flyover by the Answering Respondent herein.
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> 3. It is further submitted that answering respondent herein vide circular No.NH-110065/12/2003-P&M dated 15th September, 2004, has exempted the defence vehicles from payment of user fee (toll tax) for use of a section of National Highway / permanent bridge / temporary bridge on National Highway, in conformity with the Indian Tolls (Army and Air Force) Act, 1901.
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> xxxxx xxxxx xxxxx xxxxx xxxxx
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> 7. It is most respectfully submitted that Levying of Toll Tax upon DND Flyover is beyond the purview of the Answering Respondent herein, as the same does not fall under the category of highways, as provided by the National Highways Act, 1956 and no Toll Tax, whatsoever, has been imposed by the Answering Respondent herein on DND Flyover."

9. The circular issued on 15.09.2004 by the Government of India, Ministry of Shipping, Road Transport and Highways, Department of Road Transport and Highways, so far as it is relevant herein, reads as under:

> "2. Extracts from the Indian Tolls (Army and Air Force) Act, 1901 are enclosed (Annex-I). This Ministry has notified National Highways (Collection of fee by any person for use of section on National Highways, permanent bridge/temporary bridge on National Highways) amendment rules 2003 vide GSR No.834 (F) dated 27th October, 2003. According to these rules certain categories vehicles, including defence vehicles, are exempted from

> payment of users fee given in the notification. The details of all such defence vehicles/persons exempted from payment of users fees are enclosed (Annex II). These exemptions have also been made applicable for public funded projects."

Therefore, the position of the Government of India is clear that the DND Flyway being neither a National Highway or a public funded project, it has no authority over the same.

10. Considering the arguments advanced by the counsel for the parties, I take up the first question of maintainability of the writ petition on the ground of territorial jurisdiction. It has been contended by Mr Kaul that this court ought not to exercise jurisdiction in this case because, firstly, no part of the cause of action has arisen within the territory of Delhi and, secondly, even if it is considered that a small part of the cause of action arises within Delhi, the substantial part arose in Uttar Pradesh and, therefore, the High Court at Allahabad would have jurisdiction. The learned counsel for the petitioner replied to this submission by submitting that the cause of action was a bundle of facts which took within its fold the user of the DND Flyway as well as the charge for such user. She submitted that part of the DND Flyway was within the territory of Delhi, therefore, part of its user would be within Delhi. Secondly, she submitted that the mere fact that the fee for such user was collected in Uttar Pradesh, would not take away the jurisdiction of this court to entertain this petition.

11. I am in agreement with the submission made by the learned counsel for the petitioner that user of the DND Flyway, as defined in the Concessionaire Agreement itself, would indicate that part of it would arise within the territory of Delhi and would definitely constitute part of the cause of action and, therefore, this court would have jurisdiction to entertain the present writ petition. Insofar as the issue of forum of convenience is concerned, it cannot be said that the High Court at Allahabad is more convenient than the High Court at Delhi. The reason being that NOIDA is closer to Delhi than it is to Allahabad and part of the flyway happens to be in Delhi also. So, on this ground also, I am of the view that this petition is maintainable on the count of territorial jurisdiction.

12. Coming, now, to the merits of the matter, the key question that has to be answered is the manner in which the 1901 Act is to be interpreted. The relevant provisions of the said Act are Sections 2 (j) and Section (3). The same, so far as are relevant, are set out hereinbelow:-

> **"2. Definitions.**—In this Act, unless there is anything repugnant in the subject or context,—
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> xxxxx xxxxx xxxxx xxxxx xxxxx
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> (j) "tolls" includes duties, dues, rates, fees and charges, but does not include customs duties levied under the Indian Tariff Act, 1934, octroi duties or town duties on the import of goods, or fares paid for the conveyance of passengers on a tramway.
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> xxxxx xxxxx xxxxx xxxxx xxxxx

3. Exemptions from tolls.—The following persons and property, namely :-

(a) all officers, soldiers and airmen of—

(i) the Regular Forces.

xxxxx xxxxx xxxxx xxxxx xxxxx

shall be exempted from payment of any tolls—

(i) on embarking or disembarking or on being shipped or landed, from or upon any landing-place, or

(ii) in passing along or over any turnpike or other road or bridge, or

(iii) on being carried by means of any ferry,

otherwise demandable by virtue of any Act, Ordinance, Regulation, order or direction of any legislature or other public authority in India:

Provided that nothing in this section shall exempt any boats, barges or other vessels employed in conveying the said persons or property along any canal from payment of tolls in like manner as other boats, barges and vessels.

Explanation.—The persons or property exempted under clauses (d), (e), (g) and (j) shall be deemed to accompany the Forces, troops, persons or property concerned, when the move of the former is the direct result of, or is connected with the move of the latter, irrespective of the interval of space and time between the two moves."

13. It can be seen that the expression "tolls" used in Section 3 which grants the exemption has been defined in Section 2 (j) to include duties, dues, rates, fees and charges, but not customs duties, octroi duties or town duties on the import of goods or fares paid for the conveyance of passengers on a tramway. A reading of this definition indicates that the word fees has been used alongwith duties, dues, rates and charges which all indicate some manner of a public levy by a Government authority or a public

authority under the Government. It is the contention of Mr Kaul that it would not include the levy of private fees for user of the DND Flyway by a private company which cannot be brought in within the fold of the expression "public authority". It is, therefore, to be seen that there is a difference between tolls / fees, charged for a private funded project and tolls / fees charged for a project which has been funded entirely by Government funds at public expense. The distinction that is sought to be drawn is that while in the case of a toll charged by the Government or a public authority, the same would normally be charged on a no-profit no-loss basis, where the costs of the project would be recovered, in part or whole, through such tolls or or fees, but, the funding would have come through raising of revenues by the Government. In the case of the fees charged by the company, the funding is entirely private. No part of it has come from tax revenues or other revenues raised by the Government. It is for this reason that the company has been permitted by the Uttar Pradesh Act of 1976 and the 1998 regulations framed thereunder as well as the Concessionaire Agreement to not only collect the fees, but also to appropriate and retain the same so as to recover the entire cost of the project and also to make profit thereon. Clearly, such a situation was not in the contemplation of the Legislature when the 1901 Act came to be passed. It is further clear that if exemptions are to be granted, then the whole object and purpose of the project would be undermined as the company would not be in a position to recover its costs for the project. Therefore, the provisions of Section 3 must be read in the light of the observations of the Supreme Court in the case of ***B.N. Sinha*** *(supra)* wherein the Supreme Court had clearly stated that the interpretation of

the statute must not be extended to such an extent which was not in the contemplation of the Legislature at the time of passing of the particular statute. This being the case, I am in agreement with the submissions made by Mr Kaul that the fee charged by the company would not fall within the exemption granted by virtue of Section 3 of the 1901 Act.

14. Lastly, it was contended by the learned counsel for the petitioner that the company was not charging the fee on its own account, but it was charging the fee for and on behalf of the respondent No.3. As submitted by Mr Kaul, it must be noted that the company was not acting as a collecting agent for the respondent No.3. It was entitled under the agreement to not only collect, but also to appropriate and retain the same. In fact, the agreement goes to the extent of indemnifying the company by virtue of Article 13.1 (e) in cases where, for reasons beyond their control, they are unable to make the collections, as contemplated under the agreement.

15. Accordingly, while I hold that this writ petition is maintainable, the same is not tenable on merits. Therefore, the writ petition stands dismissed.

BADAR DURREZ AHMED
(JUDGE)

March 06, 2007
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